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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL GILLESPIE,

Defendant and Appellant.

D069389

(Super. Ct. No. SCD258034)

APPEAL from a judgment of the Superior Court of San Diego County, Kenneth K. So, Judge. Reversed and remanded for further proceedings, and otherwise affirmed.

Lizabeth Weis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Robin Urbanski and Brendon W. Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

In this gang-related case, an information jointly charged Samuel Gillespie and his codefendants Dominique Abdullah and Keshawn Price with certain felony offenses.

Abdullah and Price pleaded guilty to shooting at an occupied vehicle (Pen. Code,¹ § 246) and admitted allegations that they each had suffered a serious felony prior and a strike prior.² A jury found Gillespie guilty of attempted murder (count 2, §§ 664 & 187, subd. (a)) and shooting at an occupied vehicle (count 3). The jury found true the allegation under section 664, subdivision, (a) (section 664(a)) that the attempted murder was willful, deliberate, and premeditated within the meaning of section 189; that Gillespie was a principal in the commission of the attempted murder and at least one principal personally discharged a firearm during the commission of that offense (§ 12022.53, subds. (c) & (e)(1)); and that he committed the crime for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)). As to count 3, the jury found to be true the allegation that Gillespie committed that offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(4)). Gillespie admitted allegations that he had suffered a prison prior, a serious felony prior, and a strike prior. After denying Gillespie's motion for a new trial, the court sentenced him to a total prison term of 25 years plus 30 years to life.

Gillespie appealed his convictions. In an opinion issued in May 2017, we affirmed the judgment. Gillespie petitioned our Supreme Court for review. The Supreme

¹ All further statutory references are to the Penal Code.

² Abdullah and Price are not parties to this appeal.

Court granted review and deferred the matter "pending consideration and disposition of a related issue in *People v. Mateo*, S232674 . . . , or pending further order of the court."

(Citation omitted.) In the meantime, our Legislature enacted Senate Bill No. 1437 (Senate Bill 1437), which "amend[s] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder" (Stats. 2018, ch. 1015, § 1(f).)

Our Supreme Court remanded the matter to us with directions to vacate our decision and reconsider the cause in light of Senate Bill 1437. We received and considered supplemental briefing on the issue. Gillespie contends that Senate Bill 1437 applies to attempted murder and that his attempted murder conviction must be reversed. He also argues that the matter must be remanded so the trial court may consider exercising its discretion under Senate Bill No. 620 (Senate Bill 620; Stats. 2017, ch. 682, § 1) and Senate Bill No. 1393 (Senate Bill 1393; Stats. 2018, ch. 1013, §§ 1-2), which allow a trial court to strike or dismiss firearm and prior serious felony enhancements.

The People concede that the matter must be remanded in light of Senate Bill 620 and Senate Bill 1393, but argue that Gillespie's claim under Senate Bill 1437 is not properly before this court because the petition procedure in Senate Bill 1437 is the exclusive means for obtaining relief. We conclude that the impact of Senate Bill 1437 on Gillespie's conviction, including whether this statute applies to an attempted murder conviction, must be assessed by the trial court in the first instance. Accordingly, we vacate our original opinion issued May 24, 2017, and issue this revised opinion addressing Gillespie's arguments in newly added sections V and VI.

FACTUAL BACKGROUND

In the early morning hours of August 16, 2014, the victim in this case, Curtis R.,³ who was a member of the Lil Africa Piru criminal street gang, drove to the neighborhood of Imperial and 50th Street looking for a friend. After he parked and got out of his car, Curtis saw four people, wearing hooded sweatshirts, hiding behind some cars and sneaking up on him. He believed the men were from a rival gang because he was in rival gang territory and he knew he was not supposed to be there. Curtis heard the sound of a gun being loaded. He quickly got back into his car and started backing up. As he did so, he heard gunshots and saw a man with a gun in his hand approaching his car. His back window was shot out. Curtis managed to drive to a safe area where he called the police.

Numerous police officers were nearby when the shooting occurred. San Diego Police Officer Rogelio Medina and his partner, Officer Blake Williams, testified they heard about 15 gunshots, first one and then a volley after a pause, from different caliber semiautomatic firearms. When Officers Medina and Williams looked in the direction of the gunfire, they saw four males wearing hooded sweatshirts run down an alley and then drive away in a white four-door Chevrolet sedan. The officers got back into their patrol car and pursued the men. Officer Medina used the radio to report a description of the Chevrolet and the direction it was traveling.

³ The victim in this case is referred to by his first name and last initial, and thereafter by his first name only, to provide some measure of anonymity. (Cal. Rules of Court, rule 8.90(b).)

Officer Randy Burgess responded to the radio call and saw the Chevrolet slowly driving toward him. The car stopped in front of Officer Burgess's patrol car, the passenger door opened, and a man wearing dark clothing got out of the car and ran away. The driver also got out of the car and fled. Officer Burgess chased the men on foot. Shortly thereafter, Officers Medina and Williams located the Chevrolet by Officer Burgess's patrol car. Officer Medina stayed with the Chevrolet to secure it while Officer Williams assisted Officer Burgess in pursuing the males who had fled.

Inside the Chevrolet the police found Gillespie's red cellphone on the driver's seat and a red backpack on the front passenger seat that contained a nine-millimeter semiautomatic handgun, a .22-caliber semiautomatic handgun and Gillespie's automobile insurance card. Police found a red bandana between the two front seats and a pair of gloves on the front passenger floorboard. Police linked both semiautomatic handguns to two gang-related shootings. The Chevrolet was registered to Gillespie and Gillespie's prints were found on the trunk lid. A latent print examiner found no usable prints on the firearms.

After other police officers arrived at the abandoned Chevrolet, Officer Medina drove his patrol car toward a location where, according to a radio report, a suspect had been arrested. A resident flagged him down and informed him there was a firearm in his backyard. Officer Medina recovered a .45-caliber semiautomatic handgun from the swimming pool in the backyard.

Police found seven .45-caliber cartridge casings and three nine-millimeter cartridge casings at the shooting scene. The .45-caliber casings were fired from the .45-

caliber handgun recovered from the pool and the nine-millimeter casings were fired from the nine-millimeter handgun inside the red backpack found in the Chevrolet.

Officer Kyle Okeson assisted in the search for the suspects and found Price, a Skyline gang member hiding near the scene. He was wearing only black shoes, a black T-shirt and boxer shorts. DNA on a pair of jeans found by the police and on the gloves found in the Chevrolet matched Price's DNA, and Price was a possible major contributor to the DNA mixture found on the .45-caliber handgun. Police detected gunpowder residue on Price's hands.

Abdullah, a documented Skyline Piru gang member, was also arrested near the crime scene. He was wearing a black hooded sweatshirt and blue jeans. Surveillance video showed Gillespie running through a backyard with Abdullah. Police arrested Gillespie three days after the shooting. His Facebook page contained a picture of the Chevrolet abandoned at the scene. During a search of Gillespie's bedroom, the police found a certificate of title signed by Gillespie releasing his interest in the Chevrolet; a box for the red cellphone that was found on the driver's seat of the Chevrolet; and, in his closet, numerous items of clothing that were red, one of the colors (along with black) of the Skyline gang.

The prosecution's gang expert, opined that even though Gillespie had no law enforcement gang contacts prior to this incident, he was a Skyline gang member on the date of the shooting. The gang expert based her opinion on Gillespie's law enforcement history, field interviews and confidential informants, the terminology he used in text

messages, his tattoos, and the color of his clothing. She also opined that Gillespie committed gang-related crimes for the benefit of the Skyline criminal street gang.

DISCUSSION

I. *DENIAL OF NEW TRIAL MOTION*

A. *Background*

In November 2015, five months after he was convicted in June of that year, Gillespie filed a motion claiming he was entitled to a new trial under section 1181, subdivision (8) (section 1181(8)), on the ground he discovered new exculpatory evidence, material to his defense, that he could not have discovered and produced at trial through the exercise of reasonable diligence. As an exhibit to his motion, Gillespie attached a copy of an interview report prepared by Karen Gould, Gillespie's Alternate Public Defender investigator, which contained her notes concerning Abdullah's statements made to her from prison after Gillespie's trial. The report indicates that, according to Abdullah, Gillespie did not know a shooting was going to occur on the night of the incident because there had been no discussion in Gillespie's car about who had a weapon as the car approached the scene at 50th Street, and Abdullah was certain that Gillespie did not have a weapon that night. Abdullah told Gould that he and a man named Jarius started shooting at a group of men in self-defense after the other group shot at them first. According to Abdullah, Gillespie ran to his car as soon as the shooting began and Gillespie and Price were already in the car when he and Jarius ran back to Gillespie's car. Abdullah claimed that Gillespie and Jarius, who had a backpack, were in the front and Price and Abdullah were in the back. Gillespie was angry with Jarius and told Jarius he

had gotten them into the situation and that Gillespie and the other three men ran from the car together after they drove away and then saw a police car coming.

The court denied Gillespie's motion for a new trial, stating in part: "I don't believe this is . . . new evidence, as set forth in the Penal Code, which would support the granting of a new trial." The court also stated: "Quite honestly, I'm not sure that any of this evidence would have affected the verdict[,] given what I know about the state of the evidence, what the officers saw, and the other physical evidence that was out there." The court also found sufficient evidence supported the jury's verdicts.

B. Applicable Legal Principles

A trial court is statutorily authorized to grant a defendant's motion for a new trial in a criminal case "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (§ 1181(8).)⁴ A motion for a new trial based on newly discovered evidence is viewed with disfavor, and denial of such a motion rarely will result in a reversal on appeal. (*People v. Fairchild* (1962) 209 Cal.App.2d 82, 84.)

⁴ Section 1181(8) provides in relevant part: "When a verdict has been rendered . . . against the defendant, the court may, upon his application, grant a new trial, in the following cases only: [¶] . . . [¶] 8. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable. "

In order to obtain a new trial under section 1181(8), the moving defendant must show (1) the evidence, and not simply its materiality, is newly discovered; (2) the evidence is not merely cumulative; (3) the defendant in the exercise of reasonable diligence could not have discovered and produced the evidence at trial; (4) the newly discovered evidence is of such strength that a result more favorable to the defendant is probable if the new evidence is admitted on retrial; and (5) these facts are shown by the best evidence of which the case admits. (*People v. Howard* (2010) 51 Cal.4th 15, 42-43; 6 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Judgment, §§ 103 & 105, pp. 145, 146.) The trial court may consider the credibility of the evidence in determining whether introduction of the proffered evidence in a new trial would render a more favorable result reasonably probable. (*Howard*, at p. 43.) A trial court's denial of a motion for a new trial will not be disturbed on appeal unless a manifest and unmistakable abuse of discretion is clearly shown. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

C. Analysis

Gillespie contends that Abdullah's statements to Gould following his conviction qualify as newly discovered evidence. He asserts the trial court prejudicially abused its discretion in denying his new trial motion because this new evidence, if admitted on retrial, would result in a more favorable outcome. For purposes of analysis we shall assume, without deciding, that Abdullah's statements to Gould which Gould summarized

in her report,⁵ is newly discovered, that it is material and not merely cumulative, and that Gillespie in the exercise of reasonable diligence could not have discovered and produced the evidence at his trial.

Having made these assumptions and, after considering the credibility of Abdullah's proffered, we cannot conclude that if he were to testify at a new trial in a manner consistent with Gould's notes concerning those statements, his testimony would be of such persuasive strength that it is reasonably probable Gillespie would obtain a more favorable outcome. The record shows that when Abdullah pleaded guilty to shooting at an occupied vehicle he also admitted allegations that he had suffered a prior serious felony conviction and a prior strike conviction. The prosecution would be entitled to use Abdullah's prior felony record to attack his credibility if he were to testify on Gillespie's behalf during a retrial. (Evid. Code, § 788; *People v. Howard*, *supra*, 51 Cal.4th at p. 43 [court may consider credibility of proffered evidence in determining whether its admission in a new trial would render a more favorable result reasonably probable].)

⁵ Gillespie did not submit an affidavit signed by Abdullah, the witness Gillespie expects will testify at a retrial in this matter, as required by section 1181(8). As noted, he attached to his new trial motion a copy of Gould's interview report containing her notes concerning statements Abdullah made to her. The prosecution did not challenge Gillespie's failure to comply with the statutory affidavit requirement. At the hearing on Gillespie's motion for a new trial, the prosecutor told the court, "Your Honor, I don't think that there is any newly discovered evidence in this particular case. *With regard to [whether] it's an affidavit or not, I didn't contest that in my [opposition] papers. [T]he People would prefer to go forward at this time with the state of the attached statement.*" (Italics added.)

In addition, several of Abdullah's statements to Gould were inconsistent with credible eyewitness testimony at Gillespie's trial. For example, Abdullah indicated that Gillespie and Price ran back to Gillespie's car without Abdullah and Jarius as soon as the first shot was fired. However, Officers Medina and Williams testified that, when they looked in the direction of the gunfire, they saw *four* males run down an alley and then drive away in a Chevrolet sedan.

In another proffered statement, Abdullah claimed that only he and Jarius shot at the other group at the scene. However, the prosecution's forensic evidence showed that gunpowder residue was detected on Price's hands and not on Abdullah's hands. The record shows Price made a statement against penal interest to Gould that he was armed with a .45-caliber handgun and fired it during the incident. (Evid. Code, § 1230.) In addition, the prosecution's forensic evidence showed that Price was a possible major contributor to the DNA mixture found on the .45-caliber handgun recovered from a swimming pool after the shooting.

In another proffered statement, Abdullah claimed that the backpack found on the front passenger seat of the Chevrolet after the shooting, which contained two semiautomatic handguns, belonged to Jarius. However, Officer David Ramirez testified that he found Gillespie's insurance card inside the backpack.

For all of the foregoing reasons, we conclude there is little, if any, chance that Gillespie would obtain a more favorable result if Abdullah were to testify at a new trial in a manner consistent with Gould's notes concerning the statements he made to her.

Accordingly, we conclude the court acted well within its broad discretion when it denied Gillespie's motion for a new trial.

II. *JURY'S FINDING UNDER SECTION 664(A) THAT THE ATTEMPTED MURDER WAS WILLFUL, DELIBERATE, AND PREMEDITATED*

A. *Background*

During her closing arguments, the prosecutor argued that Gillespie was guilty of the attempted murder of Curtis under any one of three theories: (1) "by direct action" as a perpetrator if he was "one of the shooters";⁶ (2) as a direct aider and abettor if he "knew of the plan to kill" and intentionally "took any action to facilitate that plan" by providing and driving his car and/or providing firearms and "back up"; or (3) as an aider and abettor under the natural and probable consequences doctrine if the nontarget offense of attempted murder was a reasonably foreseeable, and thus a natural and probable, consequence of any one of three target offenses (discharge of a firearm at an occupied vehicle the lesser-included offense of negligent discharge of a firearm, or assault with a deadly weapon). The jury found Gillespie guilty of attempting to murder Curtis. It also found true the allegation under section 664(a) that the attempted murder was willful, deliberate, and premeditated within the meaning of section 189.⁷

⁶ Although the prosecutor argued that Gillespie "may [have been]" the shooter who perpetrated the attempted murder, she later acknowledged in her closing argument that "in all likelihood" Price was the one who fired at Curtis while Curtis was sitting in his car.

⁷ For convenience, we refer to the attempted murder conviction with the attached true finding under section 664(a) as "attempted murder with premeditation."

B. Analysis

Citing *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), Gillespie contends that the premeditation finding attached to his attempted murder conviction must be stricken, and reduced to attempted murder. Gillespie asserts he is entitled to this relief because he was "convicted under the natural and probable consequences theory that he aided and abetted [target] offenses that reasonably and foreseeably led to the [nontarget] attempt to kill [Curtis]." Gillespie concedes that *Chiu* addresses aiding and abetting a *premeditated murder*, but asserts the *Chiu* analysis and public policy considerations logically apply to attempted murder with premeditation under the natural and probable consequence doctrine. He contends that *Chiu*, not *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*) is controlling because *Chiu* called into question and implicitly undermined and overruled *Favor*. In light of the public policy rationale in *Chiu*, he further contends that the court committed instructional error and he was convicted of attempted murder with premeditation on a legally insufficient basis in violation of his right to due process under the Fifth and Fourteenth Amendments to the federal Constitution.

The Attorney General responds that Gillespie was properly convicted of premeditated attempted murder as either a direct aider and abettor or pursuant to the natural and probable consequences doctrine, and is not entitled to reversal of the judgment on the attempted murder conviction because "the California Supreme Court's holding in *Chiu* did not overrule, call into doubt, or in any manner alter either the analysis or the holding of its decision in *Favor*." Citing *Auto Equity Sales, Inc. v. Superior Court*

(1962) 57 Cal.2d 450, 455 (*Auto Equity*), the Attorney General argues this court is bound by *Favor*, *supra*, 54 Cal.4th 868.

We conclude that (1) our analysis is governed by *Favor*, not *Chiu*; and (2) assuming without deciding that the jury found Gillespie guilty of attempted murder as an aider and abettor under the natural and probable consequences doctrine, the trial court properly imposed the life sentence under section 664(a) for his conviction of attempted murder.

In *Favor*, our high court held that an aider and abettor may be found to have committed an *attempted murder* with premeditation and deliberation on the basis of the natural and probable consequences doctrine. (*Favor*, *supra*, 54 Cal.4th at p. 872.) In *Chiu*, our high court acknowledged this holding when considering the question of how to instruct the jury on aider and abettor liability for *first degree premeditated murder* under the natural and probable consequences doctrine. (*Chiu*, *supra*, 59 Cal.4th at p. 162.) *Chiu* held that an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine, but may be convicted of first degree premeditated murder based on direct aiding and abetting principles. (*Id.* at pp. 158-159, 166.) The court explained that although first degree and second degree murder share the common elements of an "unlawful killing of a human being with malice aforethought, [first degree murder] has the additional elements of willfulness, premeditation, and deliberation, which trigger a heightened penalty"; "[t]hat mental state is uniquely subjective and personal"; and "the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and

abettor liability for first degree murder under the natural and probable consequences doctrine." (*Id.* at p. 166.)

Because a defendant cannot be convicted of first degree premeditated murder under the natural and probable consequences doctrine, the question in *Chiu* was whether giving the instructions was harmless. "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*Chiu, supra*, 59 Cal.4th at p. 167.) In *Chiu*, the court found no such valid ground. Instead, it found from jurors' questions and comments the jury "may have been focusing on the natural and probable consequence theory of aiding and abetting." (*Id.* at p. 168.) Our high court limited its ruling in *Chiu* to first degree premeditated murder (*ibid.*; *id.* at pp. 166-167), and contrasted this holding with its ruling in *Favor*, in which it held that an aider and abettor may be found to have committed an attempted murder with premeditation and deliberation on the basis of the natural and probable consequences doctrine (*Favor, supra*, 54 Cal.4th at p. 872; *Chiu*, at pp. 162-163).

We need not weigh in on the merits of *Favor*'s continuing validity. *Chiu* distinguished and did not overrule *Favor*. Until our high court overrules *Favor* it remains good law and resolves Gillespie's arguments that he must personally foresee the premeditated nature of the attempted murder and cannot be sentenced to life imprisonment without a jury finding of that fact. (*Auto Equity, supra*, 57 Cal.2d at p. 455.)

III. CRUEL AND UNUSUAL PUNISHMENT

Gillespie contends his sentence of 25 years plus 30 years to life in prison for a nonhomicide offense is the functional equivalent of a sentence of life in prison without the possibility of parole. He claims this sentence is grossly disproportionate to his offenses and constitutes cruel or unusual punishment in violation of the prohibition against such punishment in the federal and state Constitutions.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. (U.S. Const., 8th Amend.) The California Constitution prohibits cruel or unusual punishment. (Cal. Const., art. I, § 17.) Under either constitution, a sentence may be unconstitutional if it is grossly disproportionate to the crime committed. (*Graham v. Florida* (2010) 560 U.S. 48, 59-60; *People v. Dillon* (1983) 34 Cal.3d 441, 478.) Whether a sentence constitutes cruel or unusual punishment is a question of law that we review de novo, viewing the underlying facts in the light most favorable to the judgment. (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358.) A defendant must overcome a "considerable burden" when challenging a penalty as cruel or unusual. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.)

A sentence violates California's prohibition on cruel or unusual punishment if the punishment is so disproportionate to the crime for which it was imposed that it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) We apply a three-part test to determine whether a particular sentence is disproportionate to the offense for which it is imposed. First, we examine "the nature of the offense and/or the offender, with particular regard to the degree of danger both

present to society." (*Id.* at p. 425.) Second, we compare the punishment imposed with punishments prescribed by California law for more serious offenses. (*Id.* at pp. 426-427.) Third, we compare the punishment imposed with punishments prescribed by other jurisdictions for the same offense. (*Id.* at pp. 427-429.) "Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.)

Gillespie does not address any comparison of penalties for similar offenses in other states. Accordingly, he fails to demonstrate disproportionality on that basis. Nor has he shown the sentences imposed for other crimes in California are disproportional. Rather, he limited his argument to the first factor identified in *Lynch*—the nature of the offense and the offender. (*In re Lynch, supra*, 8 Cal.3d at p. 425.)

The jury found Gillespie guilty of attempting to murder Curtis and shooting at an occupied vehicle with attached gang enhancements for both offenses. Regarding the attempted murder, the jury found true the allegation that the crime was willful, deliberate, and premeditated, and that Gillespie was a principal in the commission of the crime and at least one other principal personally discharged a firearm during the commission of that offense. The evidence in this case establishes that even if Gillespie personally was not armed during the willful, deliberate, premeditated, and gang-related attempt to murder Curtis, he actively participated in its commission. Assuming without deciding the jury found him guilty as an aider and abettor under the natural and probable consequences doctrine, as Gillespie contends, the Legislature has determined that an aider and abettor is liable as a principal to the same extent as another principal who was the actual

perpetrator. (§ 31.) The Legislature has also "determined that if the attempted murder is willful, deliberate and premeditated, the offense is sufficiently serious to justify a life sentence." (*People v. Morales* (1992) 5 Cal.App.4th 917, 930; see § 664(a).) "The fact that [Curtis] was [not] injured . . . does not lessen the seriousness of the offense." (*Morales*, at p. 930.) In a senseless, apparently random and unprovoked gang-related attack, Gillespie's cohorts fired multiple gunshots at Curtis. Accordingly, the nature of Gillespie's criminal conduct is egregious.

Additionally, the nature of the offender in this case also supports the imposition of the sentence prescribed by the Legislature for his crimes. Gillespie was almost 22 years of age when he and his gang confederates committed these offenses. He acknowledges he was "not a juvenile offender." His criminal history establishes he is a recidivist felon. In 2008, a felony juvenile petition was sustained for vehicle theft. About a month later, Gillespie was charged with robbing five young victims, and a felony juvenile petition was sustained as to one count of robbery. After violating probation numerous times and being sent to Camp Barrett for 365 days, Gillespie committed a residential burglary and was found to have a concealed firearm in his car in 2011. In 2012, he engaged in a high-speed pursuit during which a backpack containing a 12-gauge shotgun and five shells were thrown out of the car by another occupant. After serving four years eight months in prison, he was released on parole and two months later committed the offenses in this case with at least two other documented gang members.

After considering the nature of both the offender and his crimes, we conclude his sentence of 25 years plus 30 years to life in prison does not violate the California

Constitution's prohibition of cruel or unusual punishment because it is not "so disproportionate to the crime[s] for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*Lynch, supra*, 8 Cal.3d at p. 424.) The sentence also does not violate the federal Constitution's prohibition of cruel or unusual punishment because it is not "grossly disproportionate" to the severity of the crimes. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 (conc. opn. of Kennedy, J.).)

Under the United States Constitution "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." (*Harmelin v. Michigan, supra*, 501 U.S. at p. 1001 (conc. opn. of Kennedy, J.), citing *Solem v. Helm* (1983) 463 U.S. 277, 288.) Successful grossly disproportionate challenges are " 'exceedingly rare' " and appear only in an " 'extreme' " case. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73.) We are not convinced that this is such a case.

IV. DUE PROCESS AND EQUAL PROTECTION

Gillespie contends "[t]he disparity in the 15 year determinate sentences being served by [his] more culpable co-defendants [(Price and Abdullah)]—with more violent criminal histories—who pleaded guilty, and Gillespie's de facto sentence of life without parole is arbitrary, unfair, and violates his rights to due process and equal protection" under the Fifth and Fourteenth Amendments to the United States Constitution, and article 1, section 7 of the California Constitution. We reject this contention.

Abdullah and Price pleaded guilty to shooting at an occupied vehicle and admitted allegations that they each had suffered a serious felony prior and a strike prior. Each

received a 15-year prison term. Gillespie declined an offer to plead guilty to the same charge with a stipulated maximum term of 15 years in prison. Gillespie's claims of constitutional error are premised in part on the assertion that his life sentence is unfair compared to the 15-year term of his cohorts. This assertion is unavailing because Gillespie disregards the obvious fact that, unlike his confederates, he was convicted not only for shooting at an occupied vehicle, but also for attempted murder and the related section 664(a) penalty allegation that the attempted murder was willful, deliberate, and premeditated. The penalty prescribed by the Legislature for that conviction and penalty finding is life in prison with the possibility of parole. (§ 664(a).)

Suggesting his sentence violates his due process rights because it is the result of vindictiveness, Gillespie asserts in his reply brief that "[o]ne of the fundamental principles of our justice system is that a defendant cannot be punished for exercising a constitutional right and that vindictiveness is to play no role in the sentencing of defendants." Gillespie also asserts that, "[w]hile a guilty plea may justify leniency, a defendant cannot be punished with a more onerous sentence *merely because he exercised his constitutional right to a jury trial*" (italics added). First, Gillespie concedes that "[t]he record does not reflect that the court vindictively sentenced [him] to a much lengthier sentence, essentially life without parole, because he did not plead guilty." As we have explained, Gillespie received the sentence prescribed by the Legislature for the crimes he committed, the allegations he admitted and the allegations the jury found to be true. Gillespie has not shown, and cannot demonstrate, that his sentence is more onerous when

compared to his confederate's sentences, merely because he exercised his constitutional right to a jury trial.

Gillespie's claim that his sentence violates his right to equal protection of the laws also fails. "To demonstrate a denial of equal protection, it must first be shown that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*People v. Goslar* (1999) 70 Cal.App.4th 270, 276, italics added.) The "similarly situated" prerequisite means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law at issue that some level of scrutiny is required in order to determine whether the distinction is justified. (*People v. Gonzalez* (2001) 87 Cal.App.4th 1, 13.) This claim appears to be premised on Gillespie's suggestion that he is similarly situated to his codefendants, Price and Abdullah, who received a lesser sentence. Gillespie has not shown, and cannot establish, that he is similarly situated to Price and Abdullah, who received lesser sentences for lesser crimes.

For all of the foregoing reasons, we affirm the judgment.

V. RELIEF UNDER SENATE BILLS 620 AND 1393

The jury found true a vicarious firearm enhancement under section 12022.53, subdivision (c) and (e)(1). Gillespie admitted that he had a prior serious felony conviction. At sentencing on December 1, 2015, Gillespie received a consecutive 20-year sentence for the enhancement and a consecutive five-year term pursuant to section 667, subdivision (a)(1) for the prior serious felony conviction.

Under an amendment to sections 12022.5 and 12022.53, effective January 1, 2018, trial courts may, "in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed" (§§ 12022.5, subd. (c), 12022.53, subd. (h); *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) The parties agree, and we concur, that this court should remand the matter for resentencing to allow the trial court to exercise its discretion to strike the firearm enhancement under amended section 12022.53, subdivision (h).

On September 30, 2018, the Governor signed Senate Bill 1393 which, on January 1, 2019, amended sections 667, subdivision (a)(1) and 1385, subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2; see §§ 667, subd. (a)(1), 1385, subd. (b).) The parties agree, and we concur, that this court should remand the matter for resentencing to allow the trial court to exercise its discretion to strike the prior serious felony conviction enhancement under amended sections 667, subdivision (a) and 1385, subdivision (b).

VI. RELIEF UNDER SENATE BILL 1437

During the pendency of this appeal, the Governor signed Senate Bill 1437 into law, effective January 1, 2019. (*People v. Martinez* (2019) 31 Cal.App.5th 719, 722 (*Martinez*).) "Senate Bill 1437 was enacted to 'amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless

indifference to human life.' [Citation.] Substantively, Senate Bill 1437 accomplishes this by amending section 188, which defines malice, and section 189, which defines the degrees of murder, and as now amended, addresses felony murder liability. Senate Bill 1437 also adds . . . section 1170.95, which allows those 'convicted of felony murder or murder under a natural and probable consequences theory . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts' " (*Id.* at p. 723.)

Section 1170.95 establishes a procedure which allows defendants to petition the sentencing court to consider the evidence in the record, as well as new and additional evidence, to determine whether the petitioner is entitled to retroactive sentencing relief under Senate Bill 1437. (§ 1170.95, subds. (a), (d)(3).) If the petitioner has made a "prima facie showing" that he or she "falls within the provisions" (*id.*, subd. (c)) of section 1170.95, the sentencing court must hold a hearing "to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (*Id.*, subd. (d)(1).) The parties "may rely on the record of conviction or offer new or additional evidence." (*Id.*, subd. (d)(3).)

Gillespie argues that Senate Bill 1437 eliminated liability for attempted murder under the natural and probable consequence doctrine and that his conviction for attempted premeditated murder must be reversed and the matter remanded for resentencing. Should we reject his argument that Senate Bill 1437 applies to attempted

murder, he contends this court should follow the tradition of interpreting remedial statutes to apply to lesser included offenses. Given that attempted murder is a lesser included offense of murder, he argues this court should interpret Senate Bill 1437 to apply to attempted murder to avoid the absurd result of an offender who attempted to commit murder receiving a harsher sentence than an offender who committed murder.

The People argue that Gillespie's claim under Senate Bill 1437 is not properly before this court because the petition procedure in section 1170.95 is the exclusive means for obtaining relief. The People claim that the plain language and legislative history for Senate Bill 1437 show that it does not apply to convictions for attempted murder and no absurdity would result if this court follows the plain language of the statute. Specifically, the People contend that because the sentence for attempted murder is much shorter than murder, the Legislature could have reasonably determined that reforming attempted murder law would not further the Legislature's goal of eliminating long terms of imprisonment which are out of line with culpability. The People further assert that the Legislature could have concluded that if Senate Bill 1437 were extended to attempted premeditated murder defendants, then the money and resources needed to administer the additional petitions would be dramatically greater and thus unwarranted.

Two recent appellate court opinions hold that Senate Bill 1437 "should not be applied retroactively to nonfinal convictions on direct appeal." (*Martinez, supra*, 31 Cal.App.5th at p. 727; *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1149-1153 [adopting *Martinez's* analysis and holding].) These courts concluded that Senate Bill 1437 provides retroactivity rules in section 1170.95, that this section "does not

distinguish between persons whose sentences are final and those whose sentences are not" and thus acts as "a significant indication [that] Senate Bill 1437 should not be applied retroactively to nonfinal convictions on direct appeal." (*Martinez*, at p. 727; *Anthony*, at p. 1152.)

We agree that Gillespie must first seek relief through the section 1170.95 petition process in the sentencing court—here, the superior court— and not through this direct appeal. Thus, we affirm Gillespie's attempted murder conviction without prejudice to his filing a section 1170.95 petition in the superior court. The superior court can, in the first instance, determine whether Senate Bill 1437 applies to an attempted murder conviction and whether Gillespie otherwise qualifies for relief.

DISPOSITION

The judgment is reversed for the purpose of remanding to the trial court with directions that it decide whether to exercise its discretion to (1) strike the five-year enhancement for Gillespie's prior serious felony conviction; and (2) strike the firearm

enhancement. The matter is also remanded to give Gillespie the opportunity to file a section 1170.95 petition. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

IRION, J.